

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

|                           |   |                         |
|---------------------------|---|-------------------------|
| ANTHONY WAYNE POLITTE,    | ) |                         |
|                           | ) |                         |
| Movant,                   | ) |                         |
|                           | ) |                         |
| vs.                       | ) | Case No. 4:05CV1323 RWS |
|                           | ) |                         |
| UNITED STATES OF AMERICA, | ) |                         |
|                           | ) |                         |
| Respondent.               | ) |                         |

**MEMORANDUM AND ORDER**

This matter is before me on the motion of Anthony Politte to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.

On May 24, 2004, Politte plead guilty to conspiracy to possess pseudoephedrine. On August 30, 2004, I sentenced Mr. Politte to a period of seventy (70) months incarceration followed by a two year term of supervised release. Mr. Politte did not file a direct appeal of his conviction or sentence.

In his § 2255 petition Mr. Politte contends that his sentence was imposed in violation of his Sixth Amendment right to a trial by jury. Politte seeks relief pursuant to the recent United States Supreme Court ruling in United States v. Booker, 125 S.Ct. 738 (2005). Specifically, Mr. Politte argues that I would have imposed a sentence below the applicable guideline range under the advisory guideline sentencing system set forth in Booker.

Mr. Politte is correct that Justice Breyer's remedial Booker decision removed the mandatory aspects of the Sentencing Guidelines and directed courts to impose reasonable sentences by considering the applicable sentencing guideline range and the sentencing factors set forth by Congress in 18 U.S.C. § 3553(a). Booker, 125 S.Ct. at 743-745.

However, the United States Court of Appeals for the Eighth Circuit has consistently held that Booker does not apply retroactively to cases on collateral review. United States v. Hernandez, \_\_\_ F.3d. \_\_\_ (2006 WL 240507 8th Cir. 2006) citing Never Misses A Shot v. United States, 413 F.3d 781, 783 (8th Cir. 2005). In Never Misses A Shot the Eighth Circuit held that Booker was a new procedural rule and was not of "watershed" importance and it "does not apply to criminal convictions that became final before the rule was announced." Never Misses A Shot v. United States, 413 F.3d 783.

Mr. Politte's conviction was final before Booker was decided. As a result Mr. Politte cannot challenge his sentence under Booker for the first time in a § 2255 petition.

Following established Eighth Circuit precedent Mr. Politte's § 2255 petition must be denied.

### **Certificate of Appealability**

Under 28 U.S.C. § 2253, an appeal may not be taken to the court of appeals from a final order in a § 2255 proceeding unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253 (c)(1)(B). To grant such certificate, the justice or judge must find a substantial showing of the denial of a federal constitutional right.


Id. at § 2253 (c)(2); Tiedeman v. Benson, 122 F.3d 518, 522 (8<sup>th</sup> Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. Cox v. Norris, 133 F.3d 565, 569 (8<sup>th</sup> Cir 1997) (citing Flieger v. Delo, 16 F.3d 878, 882-83 (8<sup>th</sup> Cir.), cert. denied, 513 U.S. 946 (1994)). I am of the opinion that Anthony Politte has not made such a showing as to the grounds raised in his motion. I will not issue a certificate of appealability.

Accordingly,

**IT IS HEREBY ORDERED** that the motion of Anthony Politte for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 is denied.

**IT IS FURTHER ORDERED** that a certificate of appealability will not be issued because Anthony Politte has not made a substantial showing of the denial of a federal constitutional right.

A separate judgment in accordance with this memorandum and order is entered this same date.

  
\_\_\_\_\_  
RODNEY W. SIPPEL  
UNITED STATES DISTRICT JUDGE

Dated this 13th day of February, 2006.